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13 ETSY, INC.

14 **UNITED STATES DISTRICT COURT**
15 **NORTHERN DISTRICT OF CALIFORNIA**

16 AS YOU SOW, a 501(c)(3) non-profit
17 corporation,

18 Plaintiff,

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20 v.

21 ETSY, INC. and DOES 1-20, inclusive,

22 Defendants.
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Case No.: 24-cv-04203-MMC

**DEFENDANT ETSY, INC.'S
OBJECTION TO PLAINTIFF'S
REQUEST FOR JUDICIAL NOTICE
AND EXHIBITS ATTACHED THERETO**

Judge: Hon. Maxine M. Chesney

Date: October 11, 2024

Time: 9:00 a.m.

Location: Courtroom 7

1 **TO THIS HONORABLE COURT, THE PARTIES, AND THEIR ATTORNEYS OF**
 2 **RECORD:**

3 Defendant Etsy, Inc. objects to the Request for Judicial Notice submitted by Plaintiff As You
 4 Sow in support of Plaintiff's Opposition to Etsy's Motion to Dismiss.

5 **I. INTRODUCTION**

6 On August 20, 2024, Plaintiff submitted a Request for Judicial Notice in support of Plaintiff's
 7 Opposition to Etsy's Motion to Dismiss. Dkt. No. 22. In its Request, Plaintiff seeks to judicially
 8 notice three documents: two *Amicus Curiae* briefs from an unrelated matter and a legislative
 9 document from a 2017 hearing on Assembly Bill 1583. Etsy objects to Plaintiff's Request because
 10 judicial notice of these documents is not appropriate. Plaintiff's Request should be denied.

11 **II. THE COURT SHOULD DENY PLAINTIFF'S REQUEST FOR JUDICIAL NOTICE**

12 **A. Objection to Plaintiff's Request For Judicial Notice of Dkt. 22-1 (An *Amicus***
 13 **Brief from A Third Party In Another Case)**

14 Plaintiff first requests judicial notice of an *amicus* brief filed by a third-party public interest
 15 group, the Black Women for Wellness and the Mercury Policy Project, in an unrelated case. *See*
 16 Dkt. 22, Ex. A (Dkt. 22-1). Plaintiff then proceeds to cite this hearsay document, and "facts" therein,
 17 *for the truth of the matter asserted*: to discuss the alleged dangers of mercury in creams. *See* Dkt. 20
 18 at 6-7. Judicial notice of this document is not appropriate. It is a hearsay document from a third
 19 party and the "facts" contained in the document are neither undisputed nor capable of reliable and
 20 accurate determination. *See* Fed. R. Evid. 201(b); *Lee v. City of Los Angeles*, 250 F.3d 668, 690
 21 (9th Cir. 2001). Accordingly, even if the Court were to take judicial notice of the existence of this
 22 document, the Court could not take judicial notice of the disputed facts that Plaintiff cites from
 23 within the document.

24 **B. Objection to Plaintiff's Request For Judicial Notice of Dkt. 22-2 (An *Amicus***
 25 **Brief from the California Attorney General In a Different Case)**

26 Plaintiff next requests judicial notice of an *amicus* brief filed by the California Attorney
 27 General in a different case, *Lee v. Amazon.com, Inc.* *See* Dkt. 22, Ex. B (Dkt. 22-2). Judicial notice
 28 of this document should be denied for two reasons. First, unlike the two official Attorney General

1 letters submitted by Etsy with its Motion to Dismiss, the *amicus* brief is not an official opinion letter
 2 from the California Attorney General. Therefore, the statements in the *amicus* brief are not official
 3 opinions that are appropriate for judicial notice. *See Daugherty v. Experian Info. Solutions, Inc.*,
 4 847 F. Supp. 2d 1189, 1193 (N.D. Cal. 2012); *Nichols v. Brown*, 945 F. Supp. 2d 1079, 1091 n.4
 5 (C.D. Cal. 2013); *Smith v. Los Angeles Unified Sch. Dist.*, 830 F.3d 843, 851 n.10 (9th Cir. 2016).
 6 Second, the Court should decline to take judicial notice of this document because it has no relevance
 7 to Etsy's Motion. *See Pac. Gas & Elec. Co. v. Lynch*, 216 F. Supp. 2d 1016, 1026 (N.D. Cal. 2002)
 8 (declining to take judicial notice of irrelevant documents); *U.S. ex rel. Modglin v. DJO Global Inc.*,
 9 48 F. Supp. 3d 1362, 1382 (C.D. Cal. 2014) (declining to take judicial notice of certain documents
 10 because they were not relevant to deciding motion before the court). The Court need not look to the
 11 Attorney General's impressions in a different case, involving a different party, since the Court has
 12 the Attorney General's conclusion *in this case*, involving *this* Defendant, in the Attorney General's
 13 two official letters.

14 **C. Objection to Plaintiff's Request For Judicial Notice of Dkt. 22-3 (A Legislative**
 15 **Document For Assembly Bill 1583)**

16 In its final request, Plaintiff seeks judicial notice of a legislative document, dated March
 17 2017, that purports to include notes from the Assembly Committee on Judiciary regarding
 18 Assembly Bill 1583. *See* Dkt. 22, Ex. C (Dkt. 22-3). In its Opposition, Plaintiff then quotes a
 19 portion of this legislative document to argue that the issuance of a no-merit letter "is not prohibitive
 20 on the noticing party's ability to bring an action against the alleged violator, but letters typically
 21 discourage noticing parties from doing so." *See* Dkt. 20 at 8. The Court should deny judicial notice
 22 of this document and Plaintiff's cited language. Plaintiff's cited language is included only in a
 23 section labeled as "comments" by the bill's author. Dkt. 22-3 at 4-5. Generally, the motive or
 24 understanding of an individual legislator (even the author of the bill) is not properly received as
 25 evidence of the Legislature's collective intent or understanding. *See Quintano v. Mercury Cas. Co.*,
 26 11 Cal.4th 1049, 1062 (1995). Tellingly, even in Plaintiff's own document, the subject language
 27 was *not* included by the committee in its "Summary" of the proposed statute or its summary of
 28 "Existing Law." Dkt. 22-3 at 2-4. Therefore, the Court should decline to take judicial notice of the

1 stray comment that comes from a single legislator, since it has no relevance as to the understanding
 2 of the full legislature. *See In re Kelly*, 841 F.2d 908, 912 n.3 (9th Cir. 1988) (explaining that “[s]tray
 3 comments by individual legislators...cannot be attributed to the full body that voted on the bill,” and
 4 that “[t]he opposite inference is far more likely”); *see also Pac. Gas & Elec. Co.*, 216 F. Supp. 2d at
 5 1026 (declining to take judicial notice of irrelevant documents); *U.S. ex rel. Modglin*, 48 F. Supp.
 6 3d at 1382 (declining to take judicial notice of certain documents because they were not relevant to
 7 deciding motion before the court).

8 However, if the Court does take judicial notice of this document, it should also take judicial
 9 notice of the subsequent legislative history for Assembly Bill 1583 between April 2017 and October
 10 2017 (when the bill was enacted). *See* Etsy’s Supp. RJN, Exs. 2-8. The broader legislative history
 11 shows that the reference cited by Plaintiff was excluded from *all* other legislative materials
 12 pertaining to Assembly Bill 1583. For example, none of the readings or votes on the bill—nor any
 13 of the other legislative materials between April 2017 and the passage of the bill in October 2017—
 14 say anything about the collective Legislature sharing that understanding. *See id.* If anything, this
 15 suggests that the broader Legislature did *not* agree with that understanding and intentionally
 16 removed it. *See In re Kelly*, 841 F.2d at 912 n.3.

17 **III. CONCLUSION**

18 For these reasons, the Court should deny Plaintiff’s Request for Judicial Notice.

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 20 DATED: September 17, 2024

Respectfully submitted,

21 McGUIREWOODS LLP

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 23
 24 By: /s/ Nicholas J. Hoffman

Samuel L. Tarry, Jr. (*PHV forthcoming*)

Nicholas J. Hoffman

Aria Hangval

Attorneys for Defendant

25 ETSY, INC.
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CERTIFICATE OF SERVICE

I hereby certify that on **September 17, 2024**, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and service via transmittal of a Notice of Electronic Filing.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on **September 17, 2024** at Los Angeles, California.

By: /s/ Nicholas J. Hoffman
Nicholas J. Hoffman
Attorneys for Defendant
ETSY, INC.